Supreme Court, U.S.
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In The
Supreme Court of the United States

DCT, INC. AND UTILASE, INC.,
Petitioners,

v.

OLYMPIC STEEL, INC.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

DCT Inc., contends that the value of its wholly-owned subsidiary, Utilase Inc., declined as a result of Olympic's contractually-prohibited solicitation of DCT's chief engineer. Are damages for diminution in value to a corporation cognizable in a breach of contract action -- that is, can such damages meet the Hadley v. Baxendale foreseeability requirements, and was there appropriate evidence of a "causal link" demonstrated in this case?

PARTIES TO THE PROCEEDING

Petitioners

At the time of the underlying events, only DCT, Inc. owned more than 10% of the stock of Utilase, Inc. DCT, Inc. later sold all stock in Utilase, Inc. to Noble International, Ltd.

Respondents

Olympic Steel, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not published. A Copy of the Opinion is included in the Appendix at App. A at 1a - 2a. The Opinion of the District Court for the Eastern District of Michigan is unpublished, and is included in App. B at 3a - 15a. The District Court ordered entry of Judgment on May 5, 1999, which is printed in App. C at 16a. Reconsideration was denied. App. D.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on September 6, 2000. This Petition for Writ of Certiorari is filed within 90 days of issuance of this Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Respondent Olympic Steel, Inc. ("Olympic") breached an express Non Solicitation Agreement with both Petitioner DCT, Inc. and its subsidiary, Petitioner Utilase, Inc. (hereafter jointly "DCT") by soliciting, then hiring, Utilase's Chief Engineer, Mark Williamson. Because Mr. Williamson had unique knowledge of DCT's industry leading and highly proprietary laser blank welding process, Olympic's act caused a precipitous decline in Utilase's value. Ultimately DCT, Inc. sold Utilase at a severe discount because Olympic had lured Mr. Williamson from Utilase. DCT sued Olympic for breach of contract, seeking damages to remedy this precipitous diminution in enterprise value.

On or about May 6, 1997, DCT filed suit against Olympic; jurisdiction was based on 28 U.S.C. § 1332(a). The parties ultimately filed cross-motions for summary judgment. On May 6, 1999, the District Court denied DCT's motion, holding that whether Olympic's actions constituted "solicitation" was a question of fact for the jury -- that ruling is not at issue here. However, on the same date, the Court granted Olympic's cross motion, concluding that: (1) DCT had not presented sufficient evidence to show a causal link between the breach and the damages sought, and (2) the type of damages sought were not recoverable as a matter of law. App. B at 8a, 12a.

The Court denied DCT's timely motion for reconsideration. App. D.

The District Court erred by granting Olympic's motion for summary judgment, in two respects. First, DCT set forth more than sufficient evidence to create a dispute of material fact on the causal connection between Olympic's breach and DCT's damages, but the Court focused on and improperly resolved a dispute of fact against DCT. More importantly, the Court erred in concluding that the type of damages sought are not recoverable and are not supported by the fundamental requirements of Hadley v. Baxendale and its progeny.

Petitioners filed a timely appeal with the Court of Appeals for the Sixth Circuit. On September 6, 2000, the Court of Appeals affirmed the District Court's judgment in an unpublished Per Curiam Memorandum Opinion. App. A at 2a. The Court of Appeals' decision so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court as to call for the exercise of this Court's supervisory power.

ARGUMENT FOR GRANTING WRIT

In the early 1990s, DCT, through its then-wholly-owned subsidiary, Utilase, was the industry leader in the

laser blank welding field. This was largely due to innovations that DCT pioneered under the guidance of Mark Williamson, its chief engineer.

By late 1995, Olympic Steel, Inc., became interested in entering the laser blank welding field. One way to enter this market was by purchasing Utilase from DCT; in January, 1996, Olympic and DCT began discussions of such a sale. In order to conduct due diligence and to examine the Utilase facilities and finances, Olympic signed an agreement which expressly prohibited it from soliciting Utilase employees for a two year period,[1] if the purchase did not proceed. During the due diligence tour, Olympic representatives met Mr. Williamson, Utilase's second in command. Soon after

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[1] The clause at issue, which forms the basis of this appeal, provided as follows:

> 8. During the period of two years commencing on [January 11, 1996], **[Olympic] shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person** who during such period is employed by DCT or [Utilase], whether or not such person would commit any breach of his contract of service in leaving such employment. (Emphasis added.)

meeting with Mr. Williamson, Olympic abruptly broke off negotiations without explanation.

A mere six months after signing the non solicitation agreement, Olympic embarked on a calculated scheme to entice Mr. Williamson from Utilase. The solicitation was successful, and Olympic hired Mr. Williamson in November, 1996.

DCT immediately sued Olympic for breach of the Non Solicitation Agreement because the damage caused by Olympic's breach began to occur immediately. That is, when the industry as a whole became aware of Mr. Williamson's departure, the enterprise value of Utilase plummeted. Without Mr. Williamson, Utilase was worth significantly less than it had been with him at the helm. This resulted not only from the loss of his skills but also from the sheer fact of his departure; Utilase's technology and know-how were no longer solely and securely held at Utilase.

During the time that Olympic was soliciting Mr. Williamson (Aug - Nov 1996) DCT was engaged in negotiations with another company, TWB, for the sale of Utilase for as much as $28 million. However, when TWB learned of Mr. Williamson's departure, it abandoned its proposed purchase of Utilase because TWB believed that Mr. Williamson's laser blank welding knowledge was one

of Utilase's key assets. Eventually, DCT sold Utilase in late 1997 to Noble, Inc. for $13.1 million -- nearly $15 million less than its value one year earlier.[2]

The purpose of the Non Solicitation Agreement was clear to both signatories, at the time it was entered into. Indeed, Olympic's Chief Executive Officer conceded during his deposition that its purpose was "to prevent reduction in the value of the company by removing from it [a] potentially valuable employee." Clearly, he knew that if Olympic solicited Mr. Williamson (obviously a "valuable employee") such action could reduce the value of Utilase by depriving it of a crucial resource.

Furthermore, Olympic's CEO also admitted that at the time he was considering the purchase of Utilase, he was fully aware that other companies were looking to purchase Utilase. In light of these two admissions, Olympic knew or should have known that theft of a key

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[2] DCT presented the Affidavit of Noble's CEO, who acknowledged that Noble would have been willing to pay more to purchase Utilase, if DCT could have assured Noble that Utilase's confidential information would not have been available to a Utilase competitor. With Mr. Williamson gone, DCT could not make these assurances.

technical employee would reduce the value of Utilase in a sale to one of several prospective purchasers.

In the District Court, DCT set forth pages of details chronicling Olympic's improper solicitation, pursuit and hiring of Mr. Williamson. The District Court found that there was a dispute of fact over whether these acts constituted "solicitation," and held that "[c]redibilty of the witnesses is for the fact finder to assess, not the court." This Petition assumes that whether Olympic's actions constituted "solicitation" is properly for the jury to decide.

ARGUMENT 1

DCT presented sufficient evidence of a causal link between Olympic's breach and DCT's damages

DCT's theory of liability is that Olympic breached the Non Solicitation Agreement by soliciting Mr. Williamson, thereby causing him to leave DCT. As a direct result of Olympic's actions, Mr. Williamson was removed from the helm of Utilase's laser blank welding operations. Once Mr. Williamson left for a competitor, Utilase could no longer ensure that its technology remained secure within the company; because of this, the value of Utilase declined.

Olympic moved for summary judgment, contending that there was no causal connection between Olympic's breach and the decline in value of Utilase. When faced with this motion, the Court should have focused on whether there was evidence that Olympic's breach injured DCT. That is, whether there was evidence that Olympic's breach caused the value of Utilase to decline. Instead, the Court focused on DCT's failed negotiations, apparently assuming that DCT's case must fail unless it could prove that Olympic's breach caused one specific potential buyer -- TWB -- to discontinue negotiations.[3]

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[3] In its focus on the failed negotiations, the Court also erred by delving into a dispute of fact between the parties. Olympic focused on why one specific potential buyer, TWB, withdrew its Offers to Purchase Utilase just after Mr. Williamson left Utilase. Indeed, Olympic submitted an affidavit of one of the two TWB officers who structured the TWB offer to purchase Utilase. DCT appropriately responded by relying on the affidavit of the other TWB officer who worked on the purchase offers, which established that the withdrawal was due to the breach by Olympic. However, the Court impermissibly resolved this dispute of fact by expressly crediting the affidavit proffered by Olympic, the moving party. The Court erred by deciding this issue of fact; the Court should have permitted this issue to go to a jury.

The fact that factors other than Olympic's breach may have contributed to the decline in value of Utilase, does not preclude DCT from presenting its evidence to a jury. Under Michigan law, there may be more than one proximate cause of an injury. Allen v. Owens-Corning Fiberglas Corp., 225 Mich. App. 397, 401; 571 N.W.2d 530; 532-533 (1997). Indeed, two causes frequently operate concurrently so that both constitute a direct cause of the resulting harm. Id. Therefore, a defendant cannot escape liability for its conduct simply because the conduct of others may also have contributed to the injury suffered by a plaintiff. Owens-Corning, 225 Mich. App. at 401-402; 571 N.W.2d at 533. See also LNC Investments v. First Fidelity Bank, 173 F.3d 454, 464-465 (2nd Cir. 1999) ("[T]he presence of other contributing causes may not preclude recovery" in breach of contract case).

For the same reason, the defendant's breach of contract need not be the only cause of injury to a plaintiff; rather, a plaintiff must show only that defendant's actions were a cause of plaintiff's injury. See Tempo, Inc. v. Rapid Elec. Sales & Service Inc., 132 Mich. App. 93, 103; 347 N.W.2d 728, 733 (1984) (on appeal from verdict for defendant on its counterclaim, plaintiff argued that damages could have been caused by factors other than plaintiffs' conduct; court held that plaintiffs "were free to present their own evidence that other factors were in fact the cause of the damages."); Sattler v. Fisher Contracting

Co., 30 Mich. App. 617, 621-622; 186 N.W.2d 875, 877-878 (1971) (existence of another potential cause of damages held not to preclude plaintiff from alleging that defendant's conduct caused damages); 5 Corbin on Contracts, § 999 (1964).

DCT presented sufficient evidence of a causal link between Olympic's breach and DCT's damages.

ARGUMENT 2

Damages for the diminution on value of Utilase meet both prongs of the Hadley v. Baxendale foreseeability alternative tests: the damages "arose naturally" from Olympic's breach and they were "within the contemplation of the parties" when the contract was executed."

Under Hadley v. Baxendale, 9 Exch. 341; 156 Eng. Rep. 145 (1854), a plaintiff must prove either that its damages "arose naturally" from the breach or that the damages were in the "contemplation of the parties when the contract was executed." Lawrence v. Will Durrah & Assoc., 445 Mich. 1, 13; 516 N.W.2d 43, 48 (1994); Kewin v. Massachusetts Mut'l Life Ins. Co., 409 Mich. 401, 414; 295 N.W.2d 50, 52-53 (1980); Miholevich v. Mid-West Mut'l Auto. Ins. Co., 261 Mich. 495, 498; 246

N.W. 202, 203 (1933); Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). DCT presented evidence sufficient to show that its damages are recoverable under either of these tests.

First, the damages sought here are cognizable because they arise naturally out of Olympic's breach of contract. The contract at issue was a Non Solicitation Agreement, and the primary purpose of a Non Solicitation Agreement is to prevent precisely what happened here from occurring -- to prevent one company from benefitting at the expense of the other by raiding the key employees of the target company. Thus, damages that flow from the loss of a key employee unquestionably arise naturally from the breach of this kind of contract.

Olympic's primary argument in support of its contention that the damages did not arise naturally is based on the fact that Mr. Williamson was an at-will employee, and that it is not typical for theft of such an employee to reduce the value of a company. However, this particular employee was the Chief Engineer with intimate knowledge of all the confidential technological processes supporting Utilase's laser blank welding operations. He was subject to a stringent Confidentiality Agreement that contained provisions intended to prevent him from using Utilase's confidential and proprietary information for a competitor. Therefore, the fact that he was working as an at-will

employee should not be interpreted to mean that DCT did not recognize Mr. Williamson's value to Utilase. Olympic itself considered him to be the nucleus to its own new joint venture. Theft of a high-level employee with such specialized information can reasonably be expected to negatively affect the value of the company that loses him. Such damages typically arise naturally from the loss of a key technological employee, and in this case, arose naturally from Olympic's breach of the Non Solicitation Agreement.

Furthermore, this was a contract for non-performance. In other words, in most breach of contract cases, Party A contracts with Party B for Party B's affirmative performance and when Party B breaches, Party A sues for failure to perform an affirmative obligation. In such a case, it may indeed be difficult for Party B to anticipate, at the time of contracting, what damages will arise as a natural consequence of its breach. Here, however, DCT specifically contracted for Olympic's non-action; that is, for Olympic NOT to do something that it would otherwise be lawfully permitted to do. The contract formally reduced to writing DCT's message that "if Olympic does what it agrees not to do, it will injure DCT." Thus, the nature of the contract itself supports DCT's assertion that the damages it suffered arose naturally from the breach of the agreement.

When called on to determine whether particular damages arise naturally from a breach, Michigan courts have consistently construed this phrase very broadly. See e.g., Wendt v. Auto Owners Ins. Co., 156 Mich. App. 19, 27-29; 401 N.W.2d 375, 379-380 (1987); Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). In Wendt, the plaintiff operated a family trucking business, and his truck was damaged in a collision; he sued the insurer for breach of contract, seeking in relevant part: (1) lost profits, (2) damages for loss of use of the truck, (3) lost use of settlement proceeds, and (4) additional costs incurred from his default on the note securing the new truck. Wendt, 156 Mich. App. at 27; 401 N.W.2d at 378. The Trial Court dismissed these damage claims, finding that they did not "arise naturally" from the breach. However, the Court of Appeals reversed, noting that the defendant was aware that plaintiff was involved in a family trucking business and that the loss of a truck could cause extreme financial hardship to plaintiff and his business. Wendt, 156 Mich. App. at 29; 401 N.W.2d at 380. The Court found that the claimed damages for "lost profits" arose naturally from the breach:

> With respect to the loss of use of the settlement amount, defendant's refusal to pay plaintiff's claim would logically result in the loss of the use of the settlement amount . . . . Thus we hold the

> loss of the use of the settlement amount from the date it should have been paid until the date of the filing of the complaint can be said to have arisen naturally from the breach. Similarly, loss of the use of a vehicle and costs arising from the default on the note secured by the vehicle can also be viewed as natural consequences of defendant's failure to pay the settlement amount on a vehicle sustaining serious collision damage.

Id. (Emphasis added.). The Wendt damages, squarely embraced by the Michigan Court of Appeals, are unquestionably more remote than those sought by DCT for the decline in value of Utilase. See also Salamey v. Aetna Casualty & Surety Co., 741 F.2d 874, 877 (6th Cir. 1984)(Mich. law). The damages sought here arose naturally from the particular underlying breach in this case.

Alternatively, DCT's damages are also recoverable under Hadley v. Baxendale and its progeny because the kind of damages sought here were within the contemplation of the parties at the time of contracting, as that requirement has been interpreted in Michigan. The District Court erred by concluding that Olympic had to know in 1996 that DCT would be sold for a diminished value to Noble in 1997. Under this interpretation, the Court would only have found the damages recoverable if

Olympic could have seen into the future and known who would ultimately buy Utilase and how much would be paid. However, Michigan law requires only that Olympic "knew or had reason to know" at the time the contract was entered into, that if it breached the contract, the value of Utilase would decline.

In Lawrence v. Will Durrah & Assoc., 445 Mich. 1; 516 N.W.2d 43 (1994), the Michigan Supreme Court made clear that the parties need not have had actual knowledge that the breach will affect a specific collateral transaction at the time the contract was entered. Rather, if the parties have reason to know that damages of the type that eventually arise are likely to occur, the threshold has been met. This is true even if they have no actual knowledge of the details of the damages that eventually arise. In fact, Lawrence specifically addressed the "collateral transaction" issue:

> A similar distinction has been drawn with regard to lost profits stemming from "collateral" transactions in which some courts have employed more rigorous formulations of lack of foreseeability and absence of proximate cause as reasons to deny recovery. In Mohr v. Dix Mutual Co. Fire Ins. Co., 143 Ill.App.3d 989, 997; 97 Ill.Dec. 831, 493 N.E.2d 638 (1986), the Illinois Court of Appeals noted:

> When profits which are sought arise out of the breached contract, profits are considered an element of the contract and are presumed to have been within the contemplation of the parties. However, as in the instant case, where the profits sought arise out of a collateral transaction, the plaintiff must establish the damages with reasonable certainty and also show lost profits were within the contemplation of the parties at the time they entered the agreement.
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> * * *
>
> The collateral transaction rule has vitality, but more as a principle of proximate cause than as an aspect of Hadley v. Baxendale. The courts properly see that liability for the consequences of a breach of contract must be cut off somewhere. A strict test of actual knowledge of the collateral transaction . . . goes too far, however. . . . A reasonable test would require plaintiff to show only that defendant knew or should have known, from the nature of the transaction, that plaintiff would enter collateral transactions based upon it of the

> type actually entered. If this was foreseeable, then it is reasonable to hold defendant liable for plaintiff's losses. [Dunn, Recovery of Damage for Lost Profits (3rd ed.), 1.17, pp 48-49.]

Lawrence, 445 Mich. at 8, n 8; 516 N.W.2d at 46, n. 8. (Emphasis added.)

Therefore, under Lawrence, if a plaintiff's evidence shows that, from the nature of the underlying transaction, the defendant knew or should have known that the plaintiff would enter collateral transactions of the type the plaintiff actually entered, this is sufficient to state a prima facie case. Lawrence, 445 Mich. at 8, n. 8; 516 N.W.2d at 46, n. 8. Importantly, the plaintiff need not show that the specific details of the transaction were within the contemplation of the parties, if the type of transaction is reasonably evident from the nature of the underlying transaction. In other words, the parties need not know the names of the parties involved or the amount or extent of the likely loss; they must know simply that a loss of this type is foreseeable. See also Mohr v. Dix Mut'l County Fire Ins. Co., 143 Ill. App.3d 989, 997; 493 N.E.2d 638, 644 (1986) (finding that a fact question existed as to whether the possibility of lost profits was within the parties' contemplation when the contract was agreed to, and noting that the key issue was the foreseeability of the lost profits, not whether the parties

knew the identity of the entity to whom the profits were lost).

The evidence that DCT presented here is sufficient to show that, at the time it entered into the Non Solicitation Agreement with DCT, Olympic was aware that DCT would be attempting to sell Utilase. Olympic's CEO admitted that he knew, when the contract was signed, that its purpose was to protect Utilase from loss of valuable employees such as Mr. Williamson; that DCT intended to sell Utilase; and that DCT was engaged in negotiations for the sale of Utilase with other potential buyers. Therefore, the potential decline in value of Utilase was within the contemplation of the parties at the time of contracting. Under Lawrence, it does not matter that Olympic was unaware that Noble would be the eventual purchaser. There was ample evidence to show that Olympic knew or should have known that DCT would lose money by trying to sell Utilase to any entity after Mr. Williamson was removed by Olympic in violation of its Agreement.

ARGUMENT 3

There is No Impediment to Recovery of Damages for Diminution in Corporate Value

A party such as DCT may recover damages based on the diminution of its corporate value. See Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F.Supp 589 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d. Cir. 1993); Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc., 212 Ill.App.3d 492; 572 N.E.2d 472 (1991). See also Collins v. Ralston Purina Co., 147 F.3d 592, 594 (7th Cir. 1998) (discussing steps necessary "[t]o discourage key employees from seeking job opportunities elsewhere — a prospect that could diminish the company's market value") (emphasis added).

The most significant case recognizing damages for diminution in corporate value arising from a breach of contract is Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F.Supp 589 (E.D. Pa. 1992), aff'd, 989 F.2d 490 (3d. Cir. 1993), where the defendant bank called a loan agreement shortly before it was due to expire, thereby forcing the plaintiff business to liquidate its inventory. The case went to a jury on plaintiff's breach of contract claim in which plaintiff sought damages for the diminution in value of the company caused by defendant's breach of the loan agreement. Counsel for plaintiff presented

evidence that the plaintiff company was worth $7 to 9 million in early 1989, and sold for only two dollars early in 1990. The jury returned a verdict for $3.5 million. Windsor Shirt Co, 793 F.Supp at 594.

The defendant bank moved for judgment notwithstanding the verdict on the grounds that "[p]laintiff did not offer any proof that the Bank's breach caused anything other than nominal damage to Windsor." Windsor Shirt Co, 793 F.Supp at 596. The Court then moved to the heart of the dispute:

> The Bank argues that Plaintiff must do more than show that on one day Windsor was worth $3.5 million and then, within a month, it was worth almost nothing. The Bank argues, in fact, that Windsor must show how the Bank's breach caused Windsor's value to drop: After all, argued the Bank in court, the only significant effect of the breach was that Windsor had to give the Bank $3.5 million a month early.

Windsor Shirt Co, 793 F.Supp at 599.

The Court agreed that the plaintiff company had to show some evidence of a causal connection, but the Court rejected the Bank's argument that plaintiff's damages had to be established by "evidence of profits, sales and losses

and overall performance. . . both before and after the November 27 - December 1, 1989 actions by the Bank." Rather, the Court applied the traditional test that the plaintiff had to supply a reasonable quantity of information from which the jury could determine damages without regard to conjecture. Windsor Shirt Co, 793 F.Supp at 599-601. The Court found this test to be especially appropriate when the damages arose as a result of a single act, rather than from repeated actions over a course of years. Windsor Shirt Co, 793 F.Supp at 599. The Court ultimately concluded that, "[t]he Bank's argument that unless Windsor provided proof based on an analysis of a decline in Windsor's 'general operations, profits or sales,' it did not provide sufficient proof of damages is simply wrong." Windsor Shirt Co, 793 F.Supp at 601. The jury verdict was allowed to stand.

Another important case recognized that damages for diminution in value of a business resulting from a breach of contract are legally cognizable is Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc., 212 Ill.App.3d 492; 572 N.E.2d 472 (1991). There, following a breach of contract, the plaintiff art dealer sued defendant for two types of damages: diminished value of the company and loss of future profits.[4] The trial court instructed the jury

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[4] In Aardvark, the plaintiff art company contracted with a printing company to print a catalog of

that the plaintiff's recovery was limited to the diminished value of the company, and denied defendant's motion for a directed verdict on the diminution of value damages. The ruling was implicitly upheld on appeal, although errors in the "lost profits" damages analysis required a retrial on damages. Nonetheless, Aardvark unambiguously recognized that diminution in value of a company is an appropriate measure of damages where it results from breach of contract. Importantly, that case left the determination of the amount of damages to the jury and did not focus -- as the District Court improperly did

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plaintiff's original art and thereafter to print the actual pieces to be supplied to purchasers from the catalog. Both tasks required the printer to make color "separations" for each piece of original art. When plaintiff complained about the quality of defendant's work and refused to make full payment, defendant refused to return plaintiff's "separations." Plaintiff sued for breach of contract, seeking approximately $550,000 for the diminished value of Aardvark, and $2.8 million for lost future profits. The jury returned a verdict for $1,695,833. On appeal, the printer did not allege error as to any of the rulings regarding the diminished value of Aardvark. Rather, the printer alleged error only as to the lost profits issues. However, because the evidence of the two types of damages were intertwined, the appellate court remanded for a new trial on damages.

here -- on whether there was sufficient proof of all damages claimed (i.e., $15 million).

Both Windsor Shirt Co and Aardvark make clear that a business can recover damages for the reduction in its value resulting from a defendant's breach of contract. In Windsor Shirt Co, it was foreseeable that a bank calling a commercial customer's loan before it is due would cause a decrease in the value of that commercial entity. Similarly, in Aardvark, it was foreseeable that a printer's failure to return the crucial "separations" to the plaintiff art company would have a devastating effect on the art company's ability to fulfill its obligations to ship copies of art prints to its customers. In the same vein, here, it was foreseeable that Olympic's solicitation and hiring of Chief Engineer Mark Williamson -- the "number two man" who knew everything about Utilase's highly competitive business -- would cause a decline in the value of Utilase.

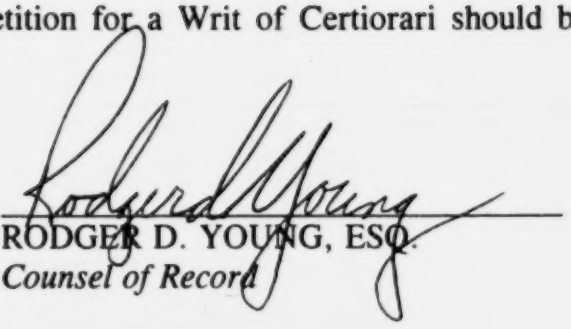
The District Court erred by concluding that the type of damages sought by DCT here were not recoverable as a matter of law.

CONCLUSION

The Court of Appeals' decision so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court as to call for the exercise of this Court's supervisory power. S.Ct.R. 10(a). DCT specifically drafted, and insisted that Olympic sign, a Non Solicitation Agreement to protect DCT from losing its employees. DCT required its key employees to sign Confidentiality Agreements. As soon as DCT learned of the breach, it sued Olympic to keep Olympic from benefitting at DCT's expense, as a result of the breach. Therefore, DCT took every reasonable step to prevent Olympic from causing injury to DCT. Yet, Olympic wilfully breach the Agreement and now claims that it should be able to do so with impunity.

Here, DCT presented sufficient evidence of a causal link between the breach and the resulting decline in value; it established that the damages sought were foreseeable within the meaning of Hadley v. Baxendale and its progeny; and contrary to the District Court's Order (as affirmed by the Sixth Circuit Court of Appeals) there is no impediment to awarding the type of damages sought here. Permitting Olympic to escape liability for the consequences of its calculated raid would set a dangerous precedent for other parties conducting due diligence reviews.

The Petition for a Writ of Certiorari should be granted.



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APPENDIX A

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed September 6, 2000]

No. 99-1769

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs-Appellants,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant-Appellee ,)
)

Appeal from the United States District Court for the Eastern District of Michigan

Before: KENNEDY and NORRIS, Circuit Judges, and KATZ, District Judge.[1]

MEMORANDUM OPINION

PER CURIAM:

[1]The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Plaintiffs, DCT, Inc., and Utilse [sic], Inc., appeal from an order of the district court granting summary judgment to defendant, Olympic Steel, Inc., in their lawsuit alleging conduct by defendant that threatened the confidentiality of their trade secrets.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to defendant.

Because the reasoning which supports judgment for defendant has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its orders filed on July 13, 1998 and May 6, 1999.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 5, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)
)

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (LIABILITY ONLY) AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT I (BREACH OF CONTRACT)

In the above captioned case, plaintiffs allege that defendant breached a non-solicitation agreement by pursuing and then hiring Utilase, Inc.'s chief engineer Mark Williamson. Now before the court is plaintiffs' motion for partial summary as to liability on their breach of contract claim (Count I), and defendant's motion for summary

judgment on Count I. For the following reasons, plaintiffs' motion shall be denied, and defendant's will be granted.

I. FACTS

Plaintiff Utilase, Inc. (Utilase) and defendant Olympic Steel, Inc. (Olympic) are business adversaries in the highly competitive field of laser blank welding. However, in late 1995 and 1996, when Olympic was contemplating entry into the laser blank welding market, Utilase's former owner DCT, Inc. (DCT) agreed to discuss with Olympic the possibility of selling Utilase if Olympic would first agree to certain disclosure safeguards. Thus, on January 11, 1996, Olympic's CEO Michael Siegel signed an agreement promising to maintain the confidentiality of Utilase's proprietary information and to refrain from soliciting any Utilase employee for two years. DCT's vice president and general counsel also signed the agreement, which provides the basis for plaintiffs' breach of contract claim. Specifically at issue is the following clause:

> 8. During the period of two years commencing on the date hereof, [Olympic] shall not solicit or actively seek to solicit the services, as employee, consultant or otherwise, of any person who during such period is employed by DCT or [Utilase],

> whether or not such person would commit any breach of his contract of service in leaving such employment.

After the contract was signed, DCT provided Olympic with a memorandum that described Utilase in detail and contained confidential operational and financial information, such as DCT's debt situation.[1] Also included was a list of Utilase's key employees including Mark Williamson. Subsequently, Olympic representatives met Williamson when they toured Utilase.

The discussions between DCT and Olympic ultimately did not result in any deal. In fact, Olympic eventually entered into a rival laser blank welding joint venture with U.S. Steel. Consequently, DCT began negotiations regarding a possible purchase of Utilase by TWB, a company that was and is in the laser blank welding business.[2]

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[1]In 1993 and 1994, DCT borrowed $36 million from the Detroit General Retirement System. By 1996, DCT still owed $34 million and was in default on the loan. DCT was therefore attempting to restructure and reduce its debt.

[2]TWB is the joint venture of Thyssen Steel, Inc. and Worthington Industries, Inc.

On or about August 1, 1996, for purchase purposes, TWB valued Utilase between $18-28 million, depending upon Utilase's 1997 projections. On August 16, 1996, TWB signed a letter of intent to purchase Utilase at a price of $20 million. Subsequently, in October of 1996, TWB submitted a revised offer to DCT to acquire Utilase for $17 million. Finally, in December of 1996, TWB decided to discontinue its negotiations with DCT regarding the purchase of Utilase.

Plaintiffs argue that from as early as August, 1996, Olympic had identified Mark Williamson as its favorite candidate for the position of laser blank welding manager and continued to pursue him with zeal until Williamson accepted Olympic's employment offer in October of 1996, thereby breaching the non-solicitation agreement. Plaintiffs insist that Williamson's departure negatively impacted their negotiations with TWB because TWB viewed Williamson as "possibly the most important in connection with the continuing operations and in the understanding of the technology of Utilase."

In order to reduce its debt to the Detroit General Retirement System (DGRS), DCT ultimately sold Utilase to Noble, Inc. on November 24, 1997, but for far less than it had anticipated.[3] DCT explains that prior to Williamson's

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[3]Plaintiffs' expert calculated the present value of the Noble purchase price to be approximately $13.1

departure, it had reached a restructure agreement with DGRS whereby the first $10 million in proceeds from the sale of Utilase would be used as DCT's working capital. Of the remainder received, DGRS would be paid the next $5.8 million and 50 percent of all proceeds received above $15.8 million. All monies received by DGRS from Utilase would first pay down the preferred stock owned by DGRS. However, because the purchase by Noble realized a lesser amount than expected, and the initial cash payment took place almost one year later than plaintiffs had anticipated, plaintiffs contend:

> DCT was not able to pay down the preferred stock of DGRS and the line of credit to the same extent nor during the same time period as would have occurred had DCT been able to sell Utilase for its fair market value [alleged to be $28 million] prior to the departure of Mr. Williamson.

Accordingly, plaintiffs filed suit against Olympic. Count I of their complaint alleges that Olympic "repeatedly breached the [non-solicitation agreement] by soliciting Mr. Williamson in connection with employment opportunities at

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million.

Olympic." Plaintiffs opine "that the economic loss as a result of Mr. Williamson's hiring by Olympic, including the loss of trade secrets and proprietary information, approximates $25.8 million." In reaching that figure, plaintiffs maintain that when Williamson left the company, Utilase was worth between $28-30 million, and that afterwards, when Williamson began working for Olympic, Utilase was sold to Noble for substantially less consideration. Thus, plaintiffs conclude:

> The damages to DCT as a result of the hiring of Mr. Williamson by Olympic include the present value of the difference in price between the fair market value of Utilase as of the time Mr. Williamson discontinued his employment with Utilase and the amount actually paid by Noble. In addition, at approximately the same time Mr. Williamson left the Company, DCT was negotiating a restructuring with the General Retirement System of the City of Detroit ("GRS"), which had loaned the Company $34 million. As a result of the loss in fair market value of Utilase at the time Mr. Williamson resigned, DCT has additionally incurred substantially more in dividend costs and interest expense on

its restructured preferred stock with the GRS and higher line of credit balances with its bank.

Now before the court are the parties' cross motions for summary judgment as to Count I. In their motion, plaintiffs argue that the record clearly demonstrates Olympic's solicitation of Williamson and thus its breach of contract. On the other hand, defendant contends that it did not solicit Williamson in violation of its agreement with plaintiffs because it was Williamson who initiated the contact with Olympic. In support of its position, defendant explains that only two witnesses - David Lenzi and Williamson - have direct knowledge of the contacts between Olympic and Williamson, and both have testified that Williamson first approached Lenzi about a position at Olympic. Defendant thus concludes that the facts do not establish solicitation by Olympic because Olympic took no affirmative action to contact Williamson. For this reason, defendant argues that plaintiffs' motion should be denied, and summary judgment should be granted in defendant's favor as to plaintiffs' breach of contract claim.

Alternatively, defendant argues in its motion for summary judgment that plaintiffs have no actionable claim for breach of contract because they cannot establish a causal link between their losses and Olympic's alleged breach.

Furthermore, defendant contends that plaintiffs' claimed damages do not arise naturally from Olympic's employment of Williamson, nor were they reasonably in the contemplation of both parties as a probable result of a breach at the time the contract was made.

On April 15, 1999, the court heard arguments on the parties' pending motions. After careful consideration, the court determines that plaintiffs' motion for partial summary judgment on the liability issue must be denied because facts remain in dispute as to who initiated the contact between Williamson and Olympic, and when. Credibility of the witnesses is for the fact finder to assess, not the court. Regarding defendant's motion for summary judgment on Count I (breach of contract), the parties stated on the record that they would rely on their briefs, to which the court now turns.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See F.D.I.C. v. Alexander, 78 F.3d 1103, 1106 (6th Cir. 1996). The Supreme Court has affirmed the court's use of summary judgment as an

integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); see also Kutrom Corp. v. City of Center Line, 979 F.2d 1171, 1174 (6th Cir. 1992).

The standard for determining whether a summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Winningham v. North Am. Resources Corp., 42 F.3d 981, 984 (6th Cir. 1994) (citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)). The evidence and all inferences therefrom must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Enertech Elec., Inc. v. Mahoning County Comm'r, 85 F.3d 257, 259 (6th Cir. 1996); Wilson v. Stroh Co., Inc., 952 F.2d 942, 945 (6th Cir. 1992). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Hartleip v. McNeilab, Inc., 83 F.3d 767, 774 (6th Cir. 1996).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 270 (1968); see also Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995). Mere allegations or denials in the non-movant's pleadings will not meet this burden. Anderson, 477 U.S. at 248. Further, the non-moving party cannot rest on its pleadings to avoid summary judgment. It must support its claim with some probative evidence. Kraft v. United States, 991 F.2d 292, 296 (6th Cir.), cert. denied, 510 U.S. 976 (1993).

III. DISCUSSION

Damage is a necessary element of an action for breach of contract under Michigan law. See, e.g., Davis v. Kramer Bros. Freight Lines, Inc., 361 Mich. 371, 376, 105 N.W.2d 29, 32 (1960). Therefore, plaintiffs' prima facie case for Count I must not only establish a breach, but also damages resulting from that breach. See, e.g., Shippey v. Madison Dist. Pub. Sch., 55 Mich. App. 663, 668, 223 N.W.2d 116, 119 (1974); see also Home Ins. Co. v. Commercial Indus. Sec. Serv., Inc., 57 Mich. App. 143, 225 N.W.2d 716 (1974) (affirming judgment for defendant where plaintiff failed to

establish that destruction of building was result of breach of contract due to absence of security guard).

Here, Olympic argues that even assuming a breach of the non-solicitation agreement, plaintiffs have failed to come forward with any proof that they suffered damages as a result of the breach. Moreover, Olympic states: "In fact, Utilase's decision to employ Mr. Williamson on an at-will basis flies in the face of any suggestion that his value to the company exceeded $25 million." The court agrees.

Plaintiffs maintain that Williamson's "defection reduces Utilase's value . . . [by] doom[ing] the purchase of Utilase by TWB." However, the record belies that assertion. Peter Klisares, former Executive Vice President of Worthington Industries, Inc., was one of the individuals who led the negotiations with DCT for the purchase of Utilase. He testified that although TWB initially offered $20 million in August of 1996, to acquire Utilase, by December of 1996, TWB was unwilling to pay more than $14 million, leaving the parties about $6 million apart. According to Klisares, the "bottom line" for the drop in price was that Utilase's net sales forecasts continued to drop throughout the due diligence period, and Utilase would not stand behind its forecasts. In fact, Klisares unequivocally stated that TWB would not have paid any more for Utilase even if Williamson had remained working there. Furthermore, Bronce Henderson, III,

Chairman of DCT, confirmed that plaintiffs told TWB they would not accept any amount less than the original price of $20 million. Thus, the uncontradicted testimony establishes that TWB was unwilling to offer a sufficient price for Utilase, with or without Williamson, and neither TWB's belief that Williamson was a "key employee" nor that his departure was "a negative" changes that fact.

Similarly, plaintiffs cannot prove their theory that the price Noble ultimately paid for Utilase was demonstrably less than it would have been had Olympic not breached its contract by soliciting Williamson. The only evidence proffered in support of plaintiffs' argument is the affidavit of Robert Skandalaris, Chief Executive Officer of Noble, stating: "Noble would have been willing to pay more than it did for Utilase if Noble had had some assurance that Utilase's confidential information would not have been made available to a Utilase competitor." However, nothing suggests that but for Williamson's departure, Utilase's alleged confidential information would have remained intact at the time of its sale. Moreover, Williamson had no employment contract with Utilase and was free to leave at any time. Even this court's injunction prohibiting Williamson from disclosing confidential information for a period of one year expired before the Noble purchase was finalized. Accordingly, plaintiffs have failed to establish that Olympic's purported

breach of the non-solicitation agreement proximately caused them to suffer any damages.

In addition to plaintiffs' inability to demonstrate a causal link between Olympic's supposed breach and the alleged damages, plaintiffs' requested damages are not recoverable as a matter of law. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach and were within the contemplation of the parties at the time the contract was executed." Parmet Homes, Inc. v. Republic Ins. Co., 111 Mich. App. 140, 149, 314 N.W.2d 453, 457 (1981) (citing Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 414, 295 N.W.2d 50, 52-53 (1980)). "Accordingly, in a commercial contract situation such as is involved here, application of this principle generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." Held Constr. Co., Inc. v. Michigan Nat'l Bank of Detroit, 124 Mich. App. 472, 477, 335 N.W.2d 8, 10 (1983) (citing Kewin, 409 Mich. at 414-15 295 N.W.2d at 53) (affirming summary judgment in favor of defendant where plaintiff claimed that it had lost future profits when it was rendered insolvent by defendant's refusal to make payment as required by contract). Furthermore, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within the

contemplation of the parties." Parmet Homes, 111 Mich. App. At 150, 314 N.W.2d at 458.

In this case, the damages sought by plaintiffs do not flow naturally from Olympic's alleged breach of the non-solicitation agreement. Had Utilase replaced Mark Williamson, the costs of replacing him would have resulted directly from Olympic's breach of the contract. However, the defection of a single at-will employee does not ordinarily give rise to $25.8 million in damages consisting of a $15 million reduction in value to the corporate employer and a $10 million increase in borrowing costs. Clearly, plaintiffs' claimed losses are not a consequence arising naturally from the alleged breach.

In addition, plaintiffs' alleged damages were not within the contemplation of the parties at the time they executed their agreement. Plaintiffs argued that DCT was engaged in a general effort to sell Utilase, and that Olympic should have known a future sale would be more difficult without Williamson. However, as held in Parmet Homes, 11 Mich. App. at 150, 314 N.W.2d at 458, "[u]nless the parties are both aware that a breach will affect a specific collateral enterprise, it cannot be said that the loss of profits from the other venture is within contemplation of the parties" (emphasis added). It is undisputed that when Olympic and

DCT signed the non-solicitation agreement, neither knew about the prospective sale of Utilase to TWB or Noble.

> The purpose of damages for breach of contract is to put the plaintiff in the same position as he would have been in had the defendant kept his contract. The injured party is not entitled to be placed in a better position than he would have been in had the contract not been broken.

Id. at 150-51, 314 N.W.2d at 458. Here, plaintiffs seek damages based on a sale price for Utilase they could only speculate they would be able to attain at the time the non-solicitation agreement was executed. Nevertheless, plaintiffs contend that Olympic should have contemplated the eventual inability of DCT to achieve that price from then unknown potential purchasers. An award of damages under these circumstances is not supported by Michigan law and, in effect, would result in a windfall to plaintiffs.

IV. CONCLUSION

For the reasons stated above,

IT IS ORDERED that plaintiffs' motion for partial summary judgment (liability only) hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment on Count I (breach of contract) hereby is GRANTED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 5, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.,)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)

JUDGMENT

In accordance with the court's orders granting defendant's motion for summary judgment entered on July 13, 1998, and May 5, 1999, and the stipulated order dismissing Count IV of plaintiffs' complaint entered on December 1, 1998,

IT IS ORDERED AND ADJUDGED that judgment hereby is GRANTED in favor of defendant as to Counts I, II, III and V of plaintiffs' complaint.

Dated at Ann Arbor, Michigan, this 5th day of May, 1999.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
[Filed May 28, 1999]
No. 97-CV-60209-AA
Hon. Barbara K. Hackett

DCT, INC., a Michigan Corp. and)
UTILASE, INC., a Michigan Corp.)
Plaintiffs,)
vs.)
OLYMPIC STEEL, INC.,)
Defendant.)

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiffs have filed a motion for reconsideration of the court's May 5, 1999, order granting defendant's motion for summary judgment on Count I (breach of contract). Local Rule 7.1(g)(3) provides:

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely

> present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

The court finds that the motion simply reiterates earlier arguments that have been previously addressed and/or considered. Plaintiffs have failed to raise a palpable defect by which the court has been misled or show that a different disposition must result. Therefore, plaintiffs' motion for reconsideration is hereby DENIED.

SO ORDERED.